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April 26, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 23, 2004

Case No.: TIA-0218

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Physician Panel and the Panel), which determined that the Applicant's illness was not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the Appeal should be granted.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a) (2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Applicant filed a Subpart B application with the DOL and a Subpart D application with the DOE, based on kidney cancer. The Applicant stated that he was employed as a first class insulator at the Idaho National Engineering Laboratory (INEEL). The Applicant stated that he worked at the Naval Reactor Facility from 1976 to 1992 and at various other parts of INEEL from 1992 to the present. Record at 9. The DOL asked the National Institute of Occupational Safety and Health (NIOSH) to undertake a dose reconstruction. The Applicant requested that OWA send his case to the Panel without awaiting the completion of the dose reconstruction. See OWA Record at 19.

The OWA found that the Applicant's employment at the Naval Reactor Facility was outside the scope of the Physician Panel Rule. Record at 13. Accordingly, the OWA forwarded the application to the Physician Panel for consideration of the Applicant's employment from 1992 to the present.

The Panel issued a negative determination. The Panel explained its determination in the following sentence: "No history of

compatible exposure or occupational history compatible with known risk for renal carcinoma." Report at 1. The OWA accepted the determination, and the Applicant appealed.

In his appeal, the Applicant questions why the Panel did not consider his employment at the Naval Research Facility. The Applicant also argues that the Panel's one-sentence explanation is insufficient to explain the basis of its determination. For example, the Applicant states, it is unclear whether the Panel considered his exposure to cadmium.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's argument that the Panel should have considered his employment at the Naval Reactor Facility does not indicate OWA or Panel error. The Act excludes, from the definition of DOE facility, facilities operated by the Naval Nuclear Propulsion Program. 42 U.S.C. § 7384l(12). Accordingly, the Applicant's employment at the Naval Reactor Facility does not fall under the Physician Panel Rule.

The Applicant's argument that the Panel did not provide a sufficient explanation of its determination has considerable merit. It is unclear whether the Panel found that the Applicant was not exposed to any substances that are risk factors for kidney cancer or whether the Panel found that the Applicant was exposed to such substances but that the level of exposures was insignificant. The record reflects exposure to asbestos, radiation and cadmium. See, e.g., Record at 256 (asbestos), 354-367 (radiation), 368 (cadmium). The Panel should have addressed those exposures in its determination, including the Applicant's assertion in his application that he had an acute radiation exposure. See Record at 9. Accordingly, reconsideration of the Applicant's claim is in order.

As the foregoing indicates, the appeal should be granted. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's grant of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0218 be, and hereby is, granted as set forth in paragraph 2 below.
- (2) The Physician Panel Report failed to explain adequately the basis of its determination. Further consideration is in order.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: April 26, 2005